EXHIBIT 3
DATE 1/25/07
HB 314

37 Mont. Op. Atty. Gen. 476, 37 Mont. Op. Atty. Gen. No. 110, 1978 WL 33524 (Mont.A.G.)

Office of the Attorney General
State of Montana

*1 Opinion No. 110
January 27, 1978

CONFLICT OF **INTEREST**--Tenant in a housing authority is ineligible to serve as commissioner of the housing authority.
SECTION--35-107, R.C.M. 1947.

HELD: A tenant in a housing authority is ineligible to serve as a commissioner of the housing authority.

David V. Gliko, Esq.
City Attorney
City of Great Falls
Great Falls, Montana 59403

Dear Mr. Gliko:

You have requested my opinion concerning whether a tenant in a housing authority may serve as a commissioner of the housing authority. A housing authority is a public body consisting of five commissioners, created pursuant to the Housing Authorities Law, Section 35-101, et. seq., R.C.M. 1947, and delegated powers to build and maintain safe and sanitary dwelling accomodations for persons of low income. The commissioners are appointed by the mayor. Section 35-105, R.C.M. 1947. Your request is governed by Section 35-107, R.C.M. 1947, which states:
No commissioner or employee of an authority shall acquire any interest direct or indirect in any housing project or in any property included or planned to be included in any project, nor shall he have any interest direct or indirect in any contract or proposed contract for materials or services to be furnished or used in connection with any housing project. If any commissioner or employee of any authority owns or controls an interest direct or indirect in any property included or planned to be included in any housing project, he shall immediately disclose the same in writing to the authority and such disclosure shall be entered upon the minutes of the authority. Failure to so disclose such interest shall constitute misconduct in office.
The Montana Supreme Court has not construed this statute in the situation posed in your request. However, two states, Connecticut and Illinois, have interpreted similar statutory language as prohibiting tenants in a housing authority from serving as commissioners of the housing authority. Although decisions of sister states are not binding upon the Montana Supreme Court, the Court has stated that when a Montana statute is similar to one in a sister state, the Supreme Court will give consideration to construction placed on that statute by courts of the sister state. Dept. of Highways v. Hy-Grade Auto Court, 169 Mont. 340, 546 P.2d 1050 (1976).
In Housing Authority of City of New Haven v. Dorsey, 164 Conn. 247, 320 A.2d 820 (1973), cert. denied 414 U.S. 1043 (1973), the Connecticut Supreme Court interpreted a statute identical to Section 35-107, R.C.M. 1947. The problem presented by a tenant of a housing authority serving as a commissioner is best stated in Dorsey at 822:
Within the context of this common-law standard the General Assembly has provided by statute that no commissioner of a housing authority shall acquire any interest, direct or indirect, in any housing project. General Statutes § 8-42. An "interest" has been defined as having a share or concern in some project or affair, as being involved, as liable to be affected or prejudiced, as having self-interest, and as being the opposite of disinterest. (Citation omitted.)
*2 The interests of a housing authority commissioner would center on the points at which management policies and functions of the authority come into contact with individual tenants. These include the selection and retention of tenants, the determination of rents to be charged, the services and other benefits to be furnished, and the enforcement of the rules governing the conduct and rights

of the tenants. In fixing rents the commissioners must consider the payments on the principal and interest on the bonded indebtedness, the cost of insurance and administrative expenses, the amounts to be set aside in reserve for repair, maintenance and replacements, and vacancy and collection losses. (Citation omitted.)
The task of fixing rent charges is such that a tenant commissioner might be called on to vote to increase his own rent in order to amortize and service the housing authority's debt obligation. If he is reluctant to increase rents which include his own, the housing authority might fail to pay its bonded indebtedness and permit unchecked physical depreciation of the properties. Matters on which the housing authority votes include the setting and the enforcing of its policies as to delinquent rents and the eviction of tenants. As a housing authority commissioner, a tenant would also be required to participiate in voting on decisions involving the hiring and firing of housing authority personnel who deal with him and his family from day to day.
Thus, whether or not the tenant as a housing authority commissioner is in fact benefiting himself individually by his vote, his personal interests are always directly or indirectly involved in his vote on the commission. This is not to say that his personal interests are inevitably and on all occasions antagonistic to the interests of the housing authority. The fact, however, that he is a tenant makes it possible for his personal interests to become antagonistic to the faithful discharge of his public duty. (Citation omitted.)
Section 35-109, R.C.M. 1947, presents this same **conflict** of **interests** by granting housing authority commissioners the same powers discussed in Dorsey.
Support for this rationale is found in Brown v. Kirk, 64 Ill.2d 144, 355 N.E.2d 12 (1976), wherein the Illinois Supreme Court, citing Dorsey, held tenants of a housing authority ineligible to serve as commissioners.
In construing legislative intent, statutes must be read and considered in their entirety and legislative intent may not be gained from wording of any particular section or sentence, but only from consideration of the whole. Vita-Rich Dairy Inc. v. Dept. of Business Regulation, ____ Mont. ____, 553 P.2d 980 (1976). Reading Section 35-107, R.C.M. 1947, in its entirety, the disclosure requirements found in the second sentence only apply to pre-existing interests. Otherwise, the first sentence of Section 35-107, R.C.M. 1947, serves no useful purpose. There would be no bar to a commissioner or employee from acquiring an interest in a housing authority because he could simply disclose this interest after acquisition. Section 35-107, R.C.M. 1947, prohibits any commissioner from acquiring an interest in property included or planned to be included in a housing authority after his appointment, but does not require a commissioner to divest himself of interests acquired prior to his appointment. A commissioner is only required to disclose the latter type of interest.
***3** The argument could be made that a person who is already a tenant of the housing authority remains eligible for appointment as commissioner. This argument was rejected by Brown. The court stated at p. 14:
However apt this distinction between a newly acquired and pre-existing interest may be in cases where the question is purchase of property to be included in a project, we think that it is not appropriate in the case of a tenant, who retains a continuing contractual relationship with his landlord subject to periodic renewal.
This continuing contractual relationship between landlord and tenant is also prohibited by Section 59-501, R.C.M. 1947, which states:
Members of the legislature, state, county, city, town, or township officers or any deputy or employee thereof, must not be interested in any contract made by them in their official capacity, or by any body, agency, or board of which they are members or employees.

THEREFORE, IT IS MY OPINION:

A tenant in a housing authority is ineligible to serve as a commissioner of the housing authority.

Sincerely,

Mike Greely
Attorney General
37 Mont. Op. Atty. Gen. 476, 37 Mont. Op. Atty. Gen. No. 110, 1978 WL 33524 (Mont.A.G.)

37 Mont. Op. Atty. Gen. 4, 37 Mont. Op. Atty. Gen. No. 2, 1977 WL 35551 (Mont.A.G.)

Office of the Attorney General
State of Montana

*1 Opinion No. 2
February 23, 1977

BOARD OF HOUSING--State contracts, officers and employees interested in;
PUBLIC CONTRACTS--Board of Housing, **conflict** of **interest**, officers and employees interested in;
CONFLICT OF **INTEREST**--Public contracts, officers and employees;
CONTRACTS--State contracts, **conflict** of **interest**, what constitutes **interest** in, Article XIII § 4, Constitution of Montana, Section 59-501, R.C.M. 1947.

HELD: 1. The Board of Housing members who are respectively the president and majority stockholder in a bank and an officer and minority stockholder in a bank would come within the prohibitions of Section 59-501, R.C.M. 1947, if the Board of Housing contracts or acts officially with the institutions with which they are associated.

2. The actions taken by these members of the Board of Housing do not, as of the date of this opinion, constitute any violation of Section 59-501.12 R.C.M. 1947.

Mr. William A. Groff
Chairman
Montana Board of Housing
Department of Community Affairs
Capitol Station
Helena, Montana 59601

Dear Mr. Groff:

You have requested my opinion on the following questions:
1. Does the status of three members of the Board of Housing create the "necessary interest in the contract" which may be entered into between banks and the Board, as to make such contract a violation of Section 59-501, R.C.M. 1947?
2. Have the actions of these members of the Board of Housing to the present time constituted a violation of Section 59-501, R.C.M. 1947?
Your letter reveals that the three Board members in question occupy the following positions, respectively, in lending institutions:
a. President and majority stockholder of a bank,
b. Officer and minority stockholder of a bank;
c. Chief executive officer of a mutual savings and loan association.
The institutions with which these Board members are affiliated are in the position to become "approved lending institutions" by the Board (Rule 22- 3.18(6)-S 1870, MAC). If approval is given by the Board, the institutions may then participate in the home mortgage loan program to low-income families administered by the Board under the Housing Act of 1975, Section 35-501 et seq., R.C.M. 1947.
The 1972 Constitution of Montana mandated (Art. XIII § 4) the Legislature to provide for a code of ethics prohibiting "**conflict** between public duty and private **interest**" for all state and local officers and employees. Section 59-501, R.C.M. 1947, was a partial response to that directive, and provides: Members of the legislature, state, county, city, town, or township officers or any deputy or employee thereof, must not be interested in any contract made by them in their official capacity, or by any body, agency, or board of which they are members or employees. In this section:
(1) The term "be interested" does not include holding a minority interest in a corporation. (2) The term "contract" does not include:
*2 a. contracts awarded to the lowest responsible bidder based on competitive bidding procedures, or

b. merchandise sold to the highest bidder at public auctions, or
c. investments or deposits in financial institutions which are in the business of loaning or receiving money, or
d. contracts for professional services.
This provision in substantially the same form has been in the laws of Montana since 1895, and, exclusive of subsections (1) and (2), was taken almost verbatum from Section 1090 of the California Government Code. The exclusions in subsection (2) from the term "contract" are not applicable here. Subsection (1) is self explanatory, and excludes a person whose only connection is that of a minority stockholder. It is helpful, therefore, to consider the construction given the remainder of this statute by the California courts.
The interest prohibition statute has been broadly interpreted in California. In the leading case of Stigall v. City of Taft, 375 P.2d 289 (Cal. 1962), the court found that the statute had been violated even where the public official resigned his post prior to the actual execution of a contract with a corporation in which he owned a majority interest. In commenting upon the breadth and intent of the statute the court said (375 P.2d at 291):
The instant statutes are concerned with any interest, other than perhaps a remote or minimal interest, which would prevent the officials involved from exercising absolute loyalty and undivided allegiance to the best interests of the city. Conceding that no fraud or dishonesty is apparent in the instant case, the object of the enactments is to remove or limit the possibility of any personal influence, either directly or indirectly which might bear on an official's decision, as well as to void contracts which are actually obtained through fraud or dishonest conduct. [Emphasis added].
The California court quoted the United States Supreme Court's opinion in U.S. v. Mississippi Valley Co., 364 U.S. 520, 549-50, concerning that Court's ruling upon a federal **conflict** of **interest** statute:

The statute is thus directed not only at dishonor, but also at conduct that tempts dishonor. This broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government. To this extent, therefore, the statute is more concerned with what might have happened in a given situation than with what actually happened. It attempts to prevent honest government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation.
Finally, the California Court concluded that the statute seeks to prohibit a person's purporting to "deal at arm's length with himself, and any construction which condones such activity is to be avoided" [Emphasis added, 375 P.2d at 292]. Subsequent cases have similarly construed the statute (People v. Sobel, 115 Cal. Rptr. 532 (1974); People v. Watson, 92 Cal. Rptr. 860 (1971) .
***3** As indicated by the language from the U.S. Supreme Court quoted above, other courts have likewise broadly construed **conflict** of **interest** statutes. In People v. Savaino, 335 N.E. 2d 553 (Ill. 1975), for example, the court held that the general rule that penal statutes are to be strictly construed in favor of the accused had no application in face of the legislative intent behind the **conflict** of **interest** statutes:
This interpretation is consonant with the legislative intent to preclude a public officer from misuse of the powers of his office for his own profit, to prevent influenced decisions, and to effectuate the advancement and protection of the public good, which, in a final analysis, constitutes the basic underlying purpose of the statute.
In Savaino the court found a violation of the Illinois **conflict** of **interest** statute even though the alleged public contract was never consumated.
The Montana case involving Section 59-501, R.C.M. 1947, Grady v. City of Livingston, 115 Mont. 47 (1943), does not help in the resolution of the present issues. In Grady, taxpayers sued to recover from certain corporations the monies paid by the City for goods and services over a period of years. Various members of the city council were employees or officials of these corporations, and the Court took no issue with the assertion that the sales in question did in fact violate the statute. The crucial factor for the majority was that the City had used or consumed all the purchased goods, and since the contracts were voidable, rather than void, (Section 59-503, R.C.M. 1947) there could be no recovery from the corporation without return of the goods. The conclusion that contracts entered in violation of Section 59-501 are not void, but merely voidable, is a major departure from California law.
Based upon the discussion above, the following points become evident:
1. Statutes prohibiting **conflicts** in **interest** in public contracts are broadly construed.

2. **Conflict** of **interest** statutes are intended to remove any official **interest** except remote or minimal **interests.**
3. The object of the statute is to remove any possibility of **conflict** of **interest.** Any interest which prevents or could tend to prevent impartial and faithful public service is prohibited.
4. There need be no showing of actual fraudulent or dishonest intent on the part of the public official involved.
5. A contract entered in violation of the statute is not void, but merely voidable.
6. If public officials violate the prohibitions of Section 59-501, they are subject to criminal sanction under Section 94-7-401, R.C.M. 1947.
As to the Board members in question, the member who is president and majority stockholder in a bank is clearly covered by Section 59-501. The Board member who is an officer and minority stockholder is also covered by the statute. Although Subsection (1) exempts minority stockholders, the greater interest evidenced by additionally being an officer should bring the member within Section 59-501. It has been held that a stronger case of interest exists when the public official involved is both an officer and a stockholder. See, State v. Robinson, 2 N.W. 2d 183 (N.D. 1942), and 140 A.L.R. 344 and cases cited therein. The case of the Board member who is the "executive officer" of a mutual savings and loan association is not as clear as the two above, because the degree of interest he has in the association is unclear. His situation should be assessed by himself and the Board in light of the thrust of the **conflict** of **interest** statute to remove and prohibit the possibility of a **conflict.** The language of the Illinois court in People v. Adduci, 108 N.E. 2d 1 (1952), is helpful:
***4** The interest against which the prohibition is leveled is such an interest as prevents or tends to prevent the public official from giving to the public that impartial and faithful service which he is in duty bound to render and which the public has every right to demand and receive.
I am mindful of the statutory requirement that members of the Board of Housing must be "informed and experienced in housing, economics of finance." Being "informed and experienced," however, falls far short of having a private interest in a public contract as prohibited by Section 59-501, R.C.M. 1947. This dichotomy is emphasized by the fact that, while Board members must be "informed and experienced" in the subject matter with which they deal, they are prohibited by criminal sanction (Section 94-7-401, R.C.M. 1947) from having the **conflict** of **interest** prohibited by Section 59-501.
Your second question is, in effect, whether the actions taken to date by the Board constitute a violation of Section 59-501. A review of the Board's actions show that they have been general in nature and have been the basic steps necessary to implement the Housing Act of 1975. The Board has not dealt individually with any institution associated with the three Board members in question. Rather, the Board has undertaken such actions as adopting form documents and regulations and authorizing the preparation and sale of bonds. These are not such actions as constitute the interest in a contract prohibited by Section 59-501.

THEREFORE, IT IS MY OPINION THAT:

1. The Board of Housing members who are respectively the president and majority stockholder in a bank and an officer and minority stockholder in a bank would come within the prohibitions of Section 59-501, R.C.M. 1947, if the Board of Housing contracts or acts officially with the institutions with which they are associated. The Board must evaluate the situation of the member who is the chief executive officer of a mutual savings and loan association in light of the material set forth in this opinion.
2. The actions taken by these members of the Board of Housing do not, as of the date of this opinion, constitute any violation of Section 59-501, R.C.M. 1947.

Very truly yours,

Mike Greely
Attorney General
37 Mont. Op. Atty. Gen. 4, 37 Mont. Op. Atty. Gen. No. 2, 1977 WL 35551 (Mont.A.G.)
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37 Mont. Op. Atty. Gen. 329, 37 Mont. Op. Atty. Gen. No. 78, 1977 WL 35626 (Mont.A.G.)

Office of the Attorney General
State of Montana

*1 Opinion No. 78
October 14, 1977

CONFLICT OF **INTEREST**--School Trustees, Furnishing Supplies For the Operation and Maintenance of Schools;
SCHOOLS--Trustees, Furnishing Supplies for the Operation and Maintenance of Schools, **Conflict** of **Interest**.

HELD: It is unlawful under Section 75-6808, R.C.M. 1947, for a corporate business in which a school board trustee is a minor stockholder to furnish supplies for the operation and maintenance of the school.

Keith D. Haker, Hsq.
Custer County Attorney
Custer County Courthouse
Miles City, Montana 59301

Dear Mr. Haker:

You have requested my opinion on the following question.
Is it unlawful for a corporate business in which a school board trustee is a minor stockholder, to furnish supplies for the operation and maintenance of the school?
Section 59-501, R.C.M. 1947, sets out a general prohibition against interest by public officials in contracts made in their official capacity. However, Section 75-6808, R.C.M. 1947, is a specific and stricter prohibition against financial interest by school trustees in school affairs. The more specific statute is therefore applicable to the instant situation.
Section 75-6808 provides in part
(1) It is unlawful for any trustee to:
(a) have any pecuniary interest, either directly or indirectly, in any contract for the erection of any school building or for the warming, ventilation, furnishing, or repairing the same; or
(b) be in any manner connected with the furnishing of supplies for the maintenance and operation of the schools; or
(c) be employed in any capacity by the school district of which he is trustee.
It is clear from a comparison of the above-quoted language to that in Section 59-501 that the legislature intended for school trustees to be held to a higher degree of accountability in this regard than public officials generally.
While Section 59-501 is specifically inapplicable to a person whose only interest is that of a minority stockholder, Section 75-6808 prohibits being "in any manner connected with" furnishing supplies for the school. Ownership of a minority stock interest in a corporation clearly constitutes the minimal connection required in Section 75-6808.

THEREFORE IT IS MY OPINION:

It is unlawful under Section 75-6808, R.C.M. 1947, for a corporate business in which a school board trustee is a minor stockholder to furnish supplies for the operation and maintenance of the school.

Very truly yours,

Mike Greely
Attorney General
37 Mont. Op. Atty. Gen. 329, 37 Mont. Op. Atty. Gen. No. 78, 1977 WL 35626 (Mont.A.G.)

40 Mont. Op. Atty. Gen. 108, 40 Mont. Op. Atty. Gen. No. 28, 1983 WL 179141 (Mont.A.G.)

Office of the Attorney General
State of Montana

*1 Opinion No. 28
December 14, 1983

CONFLICT OF **INTEREST**--Public contracts, local officials and employees;
CONTRACTS--**Conflict** of **interest**, public contracts, local officials and employees;
COUNTIES--Public contracts, **conflict** of **interest**, county commissioners, county officers and employees;
COUNTY COMMISSIONERS--Public contracts, **conflict** of **interest**;
COUNTY OFFICERS AND EMPLOYEES--Public contracts, **conflict** of **interest**;
EMPLOYEES, PUBLIC--Local officials and employees, **conflict** of **interest**, public contracts;
MUNICIPAL GOVERNMENT--Public contracts, **conflict** of **interest**, municipal officers and employees;
PUBLIC OFFICERS--Local officials and employees, **conflict** of **interest**, public contracts;
MONTANA CODE ANNOTATED--Sections 1-2-202, 2-2-102(5), 2-2-121, 2-2-125, 2-2- 131, 2-2-201, 7-3-4256, 7-3-4367, 7-5-2106, 7-5-4109;
OPINIONS OF THE ATTORNEY GENERAL--37 Op. Att'y Gen. No. 104 (1978), 38 Op. Att'y Gen. No. 55 (1979).

HELD: 1. The definitions of "be interested in" and "contract" contained in section 2-2-201, MCA, are incorporated into sections 7-5-4109 and 7-5- 2106, MCA.

2. Disclosure under section 2-2-131, MCA, is purely voluntary and may be done prior to taking any official action, as defined by section 2-2-102(5), MCA.

3. Even though an interest may be permissible under the exceptions listed in section 2-2-201, MCA, an official who has a substantial interest in the affected business must comply with sections 2-2-125 and 2-2-131, MCA.

4. If the interest is not permissible under the exceptions listed in section 2-2-201, MCA, then the contract is voidable, and abstinence from voting will not exonerate the official.

Natasha J. Morton
Hardin City Attorney
631 North Center
Hardin MT 59034

James E. Seykora
Big Horn County Attorney
Big Horn County Courthouse
Hardin MT 59034

Dear Ms. Morton and Mr. Seykora:

You have requested my opinion concerning three questions which I have phrased as follows:
1. Do the definitions of "be interested in" and "contract" contained in section 2-2-201, MCA, apply to sections 7-5-4109 and 7-5-2106, MCA, which prohibit **conflicts** of **interest** for local officials?
2. Does the voluntary disclosure provided by section 2-2-131, MCA, only apply if a local official is forced to vote to effect a decision? 3. Are the provisions of sections 7-5-4109 and 7-5-2106, MCA, satisfied by the abstinence of the local official from voting on any contract in which he has an interest?

Your first question addresses potential **conflict** of **interest** situations where a local official owns a minority **interest** in a business, where a relative of a city council member owns a majority share of a business, and where a local official owns the only business of its kind in the locality. If the definitions of section 2-2-201, MCA, apply to sections 7-5-4109 and 7-5- 2106, MCA, then under certain circumstances the local government may enter into contracts with these businesses. All three of these statutes deal with **conflicts** of **interest** for local officials.

***2** Section 7-5-2106, MCA, applies solely to the board of county commissioners and provides:

Control of **conflict** of **interest**. No member of the board must be directly or indirectly interested:

(1) in any property purchased for the use of the county;

(2) in any purchase or sale of property belonging to the county; or

(3) in any contract made by the board or other person on behalf of the county for the erection of public buildings, the opening or improvement of roads, the building of bridges, or the purchasing of supplies or for any other purpose.

This section was enacted in 1895 and has never been amended. Section 7-5- 4109, MCA, applies to city and town officials and provides:

Control of **conflict** of **interest**. The mayor, any member of the council, any city or town officer, or any relative or employee thereof must not be directly or indirectly interested in the profits of any contract entered into by the council while he is or was in office.

This section, enacted in 1887, was amended in 1895 to its present form. Related statutes applicable to alternative forms of municipal government appear in sections 7-3-4256 and 7-3-4367, MCA. The latter two statutes do not mention relatives of officials.

Section 2-2-201, MCA, is codified within a comprehensive chapter on standards of conduct for public officers and employees and provides:

Public officers, employees, and former employees not to have interest in contracts. Members of the legislature, state, county, city, town, or township officers or any deputy or employee thereof must not be interested in any contract made by them in their official capacity or by any body, agency, or board of which they are members or employees. A former employee may not, within 6 months following the termination of his employment, contract or be employed by an employer who contracts with the state or any of its subdivisions involving matters with which he was directly involved during his employment. In this section the term:

(1) "be interested in" does not include holding a minority interest in a corporation;

(2) "contract" does not include:

(a) contracts awarded to the lowest responsible bidder based on competitive bidding procedures;

(b) merchandise sold to the highest bidder at public auctions;

(c) investments or deposits in financial institutions which are in the business of loaning or receiving money;

(d) a contract with an interested party if, because of geographic restrictions, a local government could not otherwise reasonably afford itself of the subject of the contract. It shall be presumed that a local government could not otherwise reasonably afford itself of the subject of a contract if the additional cost to the local government is greater than 10% of a contract with an interested party or if the contract is for services that must be performed within a limited time period and no other contractor can provide those services within that time period.

***3** The section as enacted in 1895 consisted of the first sentence. The definitions in subsections (1) and (2)(a) to (2)(c) were added in 1973, and subsection (2)(d) was added in 1981.

The sections in Title 7 appear to **conflict** with section 2-2-201, MCA, since the former sections appear to be an absolute prohibition of any **interest** in any contract while the latter section recognizes exceptions to the definitions of "contract" and "**interest**." In resolving the apparent conflict between the statutes, the intention of the Legislature is to be followed. § 1-2-202, MCA. It is to be presumed that the Legislature does not pass useless or meaningless legislation. Crist v. Segna, 38 St. Rptr. 150, 622 P.2d 1028 (1981); State ex rel. City of Townsend v. D.A. Davidson, Inc., 166 Mont. 104, 531 P.2d 370 (1975); State ex rel. Irvin v. Anderson, 164 Mont. 513, 525 P.2d 564 (1974). Where statutes relate to the same general subject, they should be construed together and harmonized, giving effect to each. Id.; City of Billings v. Smith, 158 Mont. 197, 490 P.2d 221 (1971). Where one statute deals with a subject in general terms and another deals with the same subject in a more minute and detailed way, the latter will prevail over the former to the extent of any inconsistency. City of Billings v. Smith, supra%u.

In determining the intent of the Legislature, the legislative history may be examined. There were no relevant committee records for the 1973 amendment to section 2-2-201, MCA, which added the

definitions. The 1981 amendment adding subsection (2)(d) pertaining to geographical restrictions was discussed by the Local Government Committee of the Senate on March 17, 1981. The minutes of that meeting reflect the following:

Representative Neuman, District No. 33, said this is an act to amend **conflicts** of **interest** provisions to allow contracts whenever geographical restrictions would make a contract otherwise unavailable to a local government. The bill arises from a problem in small communities. As populations decline and businesses close, there is little competition in the towns. Local governments are precluded from obtaining services from businesses owned by people serving on the town council, etc. This bill would allow them--where because of geographical distance it is impractical for the local government to have to contract with an out-of-town business because of this statute--to contract with those local businesses.

....

Representative Neuman, in closing, said if there were two businesses in the same town, the local government would be required to purchase items from the business where there was no **conflict** of **interest**.

The legislative history of section 2-2-201(2)(d), MCA, clearly indicates an intent to have the geographical exception apply to local government officials, including county commissioners and city council members.

***4** The Legislature is presumed to enact legislation with existing legislation in mind. Teamsters, etc., Local 45 v. Montana Liquor Control Board, 155 Mont. 300, 471 P.2d 541 (1970). Sections 7-5-4109 and 7-5- 2106, MCA, were on the books when the amendments to section 2-2-201, MCA, were passed in 1973 and 1981 to specifically define "interest" and "contract" to exclude certain situations. If sections 7-5-4109 and 7-5-2106, MCA, are interpreted as an absolute prohibition and the definitions of section 2- 2-201, MCA, do not apply, then the Legislature would have performed a useless act in amending section 2-2-201, MCA. In order to give life to all of the statutes dealing with **conflicts** of **interest** in public contracts, the definitions of section 2-2-201, MCA, must be incorporated into sections 7-5-4109 and 7-5-2106, MCA.

Thus, it is permissible for a local entity to contract with a corporation even though a local official owns a minority interest in that corporation. It is also permissible for a city or town to award a contract to the lowest responsible bidder in a competitive bidding process, even if the business is owned by a relative of a city or town council member or by the official. As a final example, it is permissible for a local entity to contract with a local business owned by an official if the local entity cannot reasonably afford to procure the contract elsewhere due to geographical restrictions as defined in section 2-2-201 (2)(d), MCA.

Your next question concerns the application of the voluntary disclosure provision of section 2-2-131, MCA, which is a part of the Code of Ethics for public officials and employees. Section 2-2-131, MCA, provides for voluntary disclosure of a private **interest** which may create a **conflict** or impinge upon the fiduciary duty of public officials or employees. As disclosure is purely voluntary, it may be done at any time by anyone prior to performing an official act as defined by section 2-2-102(5), MCA. However, disclosure does not operate to excuse or to exonerate a potential violation of the Code of Ethics, except as provided in sections 2-2-121(3) and 2-2- 125(3), MCA. 37 Op. Att'y Gen. No. 104 at 431 (1978). Thus, as applied to your fact situation, the statutes operate together as follows. A contract may be awarded to the lowest responsible bidder which may be a business in which a local official owns a majority interest. § 2-2-201(2)(a), MCA. The local official who owns the business is prohibited from performing any official action directly and substantially benefiting his business. § 2-2-125(2)(b), MCA. Therefore, the official should not vote or make a recommendation or in any way participate in the award of the contract (§ 2- 2-102(5), MCA), unless he is a member of the governing body and his participation is necessary to obtain a quorum or to enable the body to act and he has complied with the disclosure provisions. §§ 2-2-125(3) and 2-2-131, MCA. See 38 Op. Att'y Gen. No. 55 at 190 (1979).

***5** Your last question is whether the provisions of sections 7-5-4109 and 7-5-2106, MCA, can be satisfied by the abstinence of the official from voting on any contract in which he has an interest. If the interest in the contract is not permitted by the exceptions listed in section 2-2-201, MCA, as discussed above, then the contract is voidable under section 2-2-203, MCA. Abstinence of the interested official from voting will not serve to cure a prohibited interest in a contract, since according to section 2-2-201, MCA, officers "must not be interested in any contract made by them in their official capacity or by any body, agency, or board of which they are members or employees."

THEREFORE, IT IS MY OPINION:

1. The definitions of "be interested in" and "contract" contained in section 2-2-201, MCA, are incorporated into sections 7-5-4109 and 7- 5-2106, MCA.
2. Disclosure under section 2-2-131, MCA, is purely voluntary and may be done prior to taking any official action, as defined by section 2-2- 102(5), MCA.
3. Even though an interest may be permissible under the exceptions listed in section 2-2-201, MCA, an official who has a substantial interest in the affected business must comply with sections 2-2-125 and 2-2-131, MCA.
4. If the interest is not permissible under the exceptions listed in section 2-2-201, MCA, then the contract is voidable, and abstinence from voting will not exonerate the official.

Very truly yours,

Mike Greely
Attorney General
40 Mont. Op. Atty. Gen. 108, 40 Mont. Op. Atty. Gen. No. 28, 1983 WL 179141 (Mont.A.G.)
END OF DOCUMENT

37 Mont. Op. Atty. Gen. 431, 37 Mont. Op. Atty. Gen. No. 104, 1978 WL 33518 (Mont.A.G.)

Office of the Attorney General
State of Montana

*1 Opinion No. 104
January 10, 1978

EMPLOYEES, PUBLIC--Code of ethics;
COUNTY OFFICERS AND EMPLOYEES--Code of ethics;
CORONER--**Conflict** of **interest**;
SHERIFF, DEPUTIES--Outside employment;
CONFLICT OF **INTEREST**--Public employees, code of ethics;
SECTIONS--39-1701 et seq., R.C.M. 1947; OP. ATTY. GEN. Vol. 35, #92.

HELD: 1. A member of a county board breaches a fiduciary duty if he enters into a substantial financial transaction for personal business with a person he inspects or supervises in the course of his official duties.

2. The voluntary disclosure provisions of Section 59-1710, R.C.M. 1947 will serve to excuse an act which would otherwise be a violation of the Code of Ethics only if the individual involved is a member of the local governing body, or a state department head or member of a state quasi-judicial or rulemaking board.

3. A county coroner who is also a mortician violates the provisions of Section 59-1707(2)(b), R.C.M. 1947 if he directs that a body be taken to a funeral parlor in which he has a substantial financial interest, unless he has no discretion to select the funeral parlor.

4. A deputy sheriff may accept employment as a security guard without violating Section 59-1707(2)(a), R.C.M. 1947.

5. A county employee breaches his fiduciary duty to the county if he engages in a substantial financial transaction for private business purposes with a county employee he supervises in the course of his official duties.

6. The Code of Ethics prohibits a county employee from using confidential information acquired in the course of his official duties to further his economic interest, but it does not prohibit a county employee from bidding on county property being sold at public auction or limit the employees' ability to purchase tax deeds.

The Honorable Frank Murray
Secretary of State
State Capitol
Helena, Montana 59601

Dear Mr. Murray:

You have requested my opinion on the following questions pursuant to your authority to issue advisory ethics opinions under Section 59-1711:
1. May a member of a county board enter into a partnership agreement with other individuals to develop property, which the board member owned prior to taking office, if the proposed development does not require action or approval by the board of which he is a member? The individual partners may from time to time appear before the board on entirely unrelated matters.
2. If a member of a county board may enter into such an arrangement, is he subject to the disclosure requirements of Section 59-1710, R.C.M. 1947?
3. Does the county coroner, who is also a mortician, violate the provisions of Section 59-1707(2)(b),

R.C.M. 1947, when acting in his official capacity as coroner, if he directs that a body be taken to a funeral parlor in which he has an ownership interest?
4. May a deputy sheriff accept employment as a security guard on his own time without violating Section 59-1707(2)(a), R.C.M. 1947?
*2 5. May a county employee employ in his private business a county employee he supervises in the course of his official duties without violating Section 59-1707(2)(a), R.C.M. 1947?
6. Does any provision of the Code of Ethics prohibit or limit the right of a county employee to bid on county property being sold at public auction, or to bid on or purchase tax deeds from the county?
The 1972 Montana Constitution directed the legislature to provide a code of ethics for government employees. Chapter 17, Title 59 was enacted by the 45th Legislature as a partial response to that mandate. Section 59-1701 provides that the purpose of the chapter is to establish a code prohibiting "**conflict** between public duty and private **interest**."
The ethical ramifications of public duty have received considerable scrutiny in the courts. See e.g. Schumacher v. City of Bozeman, 34 Mont. Rep. 1288 (1977). The United States Supreme Court in considering the rationale of a federal **conflict** of **interest** statute held:
The obvious purpose of the statute is to insure honesty in the government's business dealings by preventing federal agents who have **interests** adverse to those of the government's from advancing their own **interest** at the expense of public welfare.
The Court also held that such statutes must be given broad interpretation:
The statute is thus directed not only at dishonor, but also at conduct that tempts dishonor. This broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government. To this extent, therefore, the statute is more concerned with what might have happened in a given situation than with what actually happened. It attempts to prevent honest government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation.
U.S. v. Mississippi Valley Co., 364 U.S. 520 (1961). See also, People v. Savaino, 335 N.E.2d 553 (Ill. 1975); Stigall v. City of Taft, 375 P.2d 289 (Cal. 1962).
The Montana Code of Ethics, Section 59-1701 et seq., provides that the holding of public office or employment is a public trust. The Code prohibits certain activities, the commission of which constitutes a breach of the employee's fiduciary duty to the state. The measure of liability for fiduciary transgressions is provided in Section 86-310; the officer or employee may be required to account to the public for all profits, proceeds or the reasonable value of any benefit to him by virtue of his misconduct.
The prohibitions and penalties of the Code do not preempt prior statutory provisions which may make other activity by public employees unlawful. See for example the provisions of Section 59-501, R.C.M. 1947, regarding public contracts, and the criminal provisions for official misconduct, Section 94-7-401, especially the provisions for knowingly performing an act prohibited by law.
*3 Our Code recognizes a distinction between legislators, other officers and employees of the state government and officers and employees of local government. The Code recognizes that some actions are "**conflicts** per se between public duty and private **interest**," while other actions may or may not pose such **conflicts** depending upon the particular circumstances. Section 59- 1701.
While some actions are described as being conflicts per se," it is necessary to look at each particular transaction or relationship in conjunction with the surrounding circumstances before a determination can be made as to whether or not a breach has occurred. For example, a number of prohibitions require a "substantial financial transaction or an act "substantially" affecting economic benefit. In those instances, what is "substantial" may depend largely on the particular facts and circumstances involved.
Your first two questions describe a situation where a member of a county board enters into a partnership agreement with other individuals to develop property. The proposed development does not require action or approval by the board, but the individuals with whom the board member proposes to associate have appeared before the board in the past and may in the future appear and require board approval regarding matters not related to the proposed property development. Section 59-1707, "Rules of Conduct for Local Government Officers and Employees" provides:
(1) Proof of commission of any act enumerated in this section is proof that the actor has breached his fiduciary duty.
(2) An officer or employee of local government may not:
(a) engage in a substantial financial transaction for his private business purposes with a person whom

he inspects or supervises in the course of his official duties; or
(b) perform an official act directly and substantially affecting to its economic benefit a business or other undertaking in which he either has a substantial financial interest or is engaged as counsel, consultant, representative, or agent.
(3) A member of the governing body of a local government may perform an official act notwithstanding this section when his participation is necessary to obtain a quorum or otherwise enable the body to act, if he complies with the voluntary disclosure procedures under 59-1710.
Section 59-1702(3) specifically provides that a member of a "board, commission or committee" is an "employee" under the meaning of the Code. A partnership to develop property is a "substantial financial transaction" under the definition of "financial interest" established in Sections 59-1702(4)(a) and 59-1702(4)(d).
For the partnership to violate the Code however, it is necessary to determine whether the proposed partners are persons whom the board member "inspects or supervises in the course of his official duties." A fundamental principle of statutory interpretation is that words should be construed favoring the plain meaning of the language used. State ex rel. Huffman v. District Court, 154 Mont. 201, 461 P.2d 847 (1969). Webster's New International Dictionary, Second Edition, defines the word "inspect" as:
***4** to look upon; to view closely and critically, esp. so as to ascertain quality or state, to detect errors, etc.; to scrutinize; (2) to view and examine officially.
The same volume defines "supervise" in pertinent part "to oversee for direction; to superintend; to inspect with authority." To determine whether the board member inspects or supervises the prospective partner, it is necessary to examine the duties of the particular board in question and interpret the facts in accord with the statute on a case by case basis. If the board member does "inspect or supervise in the course of his official duties" one of his potential partners, then engaging in that business activity would be a breach of fiduciary duty under the provisions of Section 59-1707 (2)(a).
Your second question refers to voluntary disclosure. If it is determined above that no fiduciary breach is involved and that the board member may enter into such an arrangement, then he is subject to the provisions of Section 59- 1707(2)(b), and may not perform an official act which directly and substantially affects a business in which he has a substantial interest. Section 59-1710 does allow a member of a local governing board to perform an "official act" in certain circumstances if he complies with the disclosure procedures of Section 59-1710.
The disclosure provisions of Section 59-1710 provide:
A public officer or employee may, prior to acting in a manner which may impinge on his fiduciary duty, disclose the nature of his private **interest** which creates the **conflict.** He shall make the disclosure in writing to the secretary of state, listing the amount of his financial interest, if any, the purpose and duration of his services rendered, if any, and the compensation received for the services or such other information as is necessary to describe his interest. If he then performs the official act involved, he shall state for the record the fact and summary nature of the interest disclosed at the time of performing the act.
Section 59-1710 standing alone does not state that a public officer or employee is relieved of his obligations for breach of fiduciary duty by following the disclosure provisions of that section. As a practical matter, this section has no effect on a potential fiduciary breach other than to show good faith on the part of the individual disclosing. Section 59-1711 provides that the Secretary of State may issue advisory opinions. However, nothing in Section 59-1711 gives the disclosing party a right to rely on opinions the Secretary may issue.
There are only two instances in Chapter 17 where voluntary disclosure exonerates a potential breach. Section 59-1706(3), Rules of Conduct for State Officers and Employees states:
(3) A department head or a member of a quasijudicial or rulemaking board may perform an official act, notwithstanding subsection (2)(e), if his participation is necessary to the administration of the statute and if he complies with the voluntary disclosure procedures under 59-1710.
***5** Section 59-1707(3), Rules
Section 59-1707(3), Rules of Conduct for Local Government Officers and Employees, has a similar provision:
(3) A member of a governing body of a local government may perform an official act notwithstanding this section when his participation is necessary to obtain a quorum or otherwise enable the body to act, if he complies with the voluntary disclosure provision procedures under 59-1710.
Other than the two quoted provisions, nothing in Chapter 17 permits a public officer or employee to

perform an act which would be a fiduciary breach by conforming to the voluntary disclosure provisions of 59-1710. Legislative intent must be determined from the actual words used in the statute and statutory interpretors are not permitted to insert language possibly omitted. In re Transportation of School Children, 117 Mont. 618, 161 P.2d 901 (1945).

The answer to your second question can be answered by review of the Code of Ethics. You will note from the above quoted provisions of Section 59-1707(3), only members of a local governing body are permitted to perform an official act by complying with the voluntary disclosure procedures of Section 59-1710. If the county board concerned is the board of county commissioners then the disclosure provisions under Section 59-1707(3) apply. If the individual is a member of any other county board the disclosure provisions of that section will not exonerate an official act performed in derrogation of fiduciary responsibilities.

Question three involving county coroners who are also morticians was addressed in 35 Opinions of the Attorney General, No. 92 which held that Section 59-501, prohibiting county officers from being personally interested in any contract made in their official capacity, did not prohibit the county coroner, who is also a licensed mortician, from assigning coroner cases to a mortuary in which he had an interest. Section 59-501(2)(d) specifically excludes contracts for professional services. It was held that a licensed mortician is a professional, and therefore contracts entered into by licensed morticians were contracts for professional services and exempt by the statute.

However, the Code of Ethics, specifically Section 59-1707(2)(b), was enacted subsequent to that opinion and on its face prohibits such activity by a county coroner. A county coroner is a local government officer and employee as defined by Sections 59-1702(3) and (6). The facts of each case must be examined to determine if there is a substantial financial interest involved, as well as a direct and substantial economic affect when a coroner directs that a body be taken to a funeral parlor in which he has an ownership interest. Clearly, a majority or sole ownership interest is substantial but a 10% ownership interest may not be.

An official act is required for the prohibitions of Section 59-1707(2)(b) to apply. Therefore, an additional consideration is raised by your question. Section 59-1702(5) defines "official act" as:

***6** ...a vote, decision, recommendation, approval, disapproval, or other action including inaction which involves the use of discretionary authority. (Emphasis supplied).

Regarding duties of the coroner, Section 82-443 provides:

When a medical examiner or coroner takes custody of a body of a deceased person for purposes of examination and no other person claims the body, the coroner of the county in which the death ocurred or the body was found shall cause it to be decently interred. (Emphasis supplied)

It is clear that a coroner has the absolute responsibility of seeing the body is given a decent burial. But there are circumstances where the coroner has no discretion. For example, in many communities throughout the state the coroner is the only mortician in the jurisdiction. A coroner only has jurisdiction within his own county. See e.g., Sections 95-812 and 16-2406. In counties where the only mortician is the coroner, the only feasible manner in which a coroner can perform the statutory duties of Section 82-443 may be to refer the corpse to the mortuary with which he is associated. That is not a matter reasonably within the discretion of the coroner and therefore is not strictly an official act within the meaning of the Code of Ethics. However, only in those limited instances where no discretion is involved will the coroner not be in violation of Section 59-1707(2)(b).

In response to the fourth question, a deputy sheriff may work as a security guard on his off-duty hours without violating Section 59-1707(2)(a). A deputy sheriff is an employee of local government and his work as a security guard probably would be a substantial financial transaction under the definitions in the chapter. However, his work as a security guard is not a financial transaction with a person whom he inspects or supervises in the course of his official duties as the terms "inspect" or "supervise" are defined above. Consequently, there is no violation of that particular statute.

In response to your fifth question, a county employee who supervises a number of other county employees may not under the Code employ in his private part-time business, if it is a "substantial financial transaction," another county employee whom he supervises in the course of his official duties. Again, Section 59-1707(2)(a) prohibits a county employee from engaging in a substantial financial transaction with a person he inspects or supervises. In pertinent part Section 59-1702(5) defines "financial interest" as an interest held by an individual which is:

(c) an employment or perspective employment for which negotiations have begun.

The issue of whether the particular financial transaction described in your question is to be considered substantial, however, will have to be decided on a case by case basis. Consideration should be given to the nature and extent of the transaction; the nature and extent of the employee-supervisor

relationship; and the amount of remuneration in proportion to the individual salaries involved, as well as the intent and purpose of the Code.
*7 In response to your last question, there is no provision in the Code of Ethics which strictly prohibits or limits the right of a county employee to bid on county property being sold at public auction or bid on or purchase tax deeds being sold by the county. However, under the rules of conduct for all public employees, enumerated in Section 59-1704, an employee may not:
(a) disclose or use confidential information acquired in the course of his official duties in order to further substantially his personal economic interests.
This provision should be liberally construed. U.S. v. Mississippi Valley Co., supra. In addition the provisions of Sections 59-501 and 59-502 may apply in some situations. Any employee purchasing property or acquiring property through the county must certainly be mindful of the potential danger of conflict and act accordingly.

THEREFORE, IT IS MY OPINION:

1. A member of a county board breaches a fiduciary duty if he enters into a substantial financial transaction for personal business with a person he inspects or supervises in the course of his official duties.
2. The voluntary disclosure provisions of Section 59-1710, R.C.M. 1947 will serve to exonerate an act which would otherwise be a violation of the Code of Ethics only if the individual involved is a member of the local governing body, a state department head or member of a state quasi-judicial or rulemaking board.
3. A county coroner who is also a mortician violates the provisions of Section 59-1707(2)(b), R.C.M. 1947 when he directs a body be taken to a funeral parlor in which he has a substantial financial interest, unless he has no discretion to select the funeral parlor.
4. A deputy sheriff may accept employment as a security guard without violating Section 59-1707(2)(a), R.C.M. 1947.
5. A county employee breaches his fiduciary duty to the county if he engages in a substantial financial transaction for private business purposes with a county employee he supervises in the course of his official duties.
6. The Code of Ethics prohibits a county employee from using confidential information acquired in the course of his official duties to further his economic interest, but it does not prohibit a county employee from bidding on county property being sold at public auction or limit the employees' ability to purchase tax deeds.

Very truly yours,

Mike Greely
Attorney General
37 Mont. Op. Atty. Gen. 431, 37 Mont. Op. Atty. Gen. No. 104, 1978 WL 33518 (Mont.A.G.)
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47 Mont. Op. Atty. Gen. No. 19, 1998 WL 714203 (Mont.A.G.)

Office of the Attorney General
State of Montana

*1 Opinion No. 19
October 13, 1998

CITIES AND TOWNS - Public works employee or director as city council member;
CONFLICT OF **INTEREST** - Hospital district employee as hospital district trustee;
CONFLICT OF **INTEREST** - Public works employee or director as city council member;
COUNTY OFFICERS AND EMPLOYEES - Hospital district employee as hospital district trustee;
HEALTH BOARDS AND DISTRICTS - Hospital district employee as hospital district trustee;
HEALTH CARE FACILITIES - Hospital district employee as hospital district trustee;
HOSPITAL DISTRICTS - Hospital district employee as hospital district trustee;
LOCAL GOVERNMENT - Hospital district employee as hospital district trustee;
LOCAL GOVERNMENT - Public works employee or director as city council member;
PUBLIC OFFICERS - Hospital district employee as hospital district trustee;
PUBLIC OFFICERS - Public works employee or director as city council member;
MONTANA CODE ANNOTATED - Section 7-34-2120; OPINIONS OF THE ATTORNEY GENERAL - 46 Op. Att'y Gen. No. 26 (1996), 43 Op. Att'y Gen. No. 47 (1989), 41 Op. Att'y Gen. No. 81 (1986), 37 Op. Att'y Gen. No. 102 (1977).

HELD: 1. A hospital district employee cannot be a hospital district trustee.

2. A public works employee or director cannot be a member of the city council. The positions are incompatible.

Mr. Allin H. Cheetham
Chouteau County Attorney
P.O. Box 112
Fort Benton, MT 59442-0112

Mr. Richard L. Burns
Glendive City Attorney
P.O. Box 6
Glendive, MT 59330

Dear Mr. Cheetham and Mr. Burns:

You have recently asked my opinion on questions which are closely related and require similar analysis. I am therefore responding to both requests with one opinion. The related questions are:
1. May a hospital district employee be a trustee of the hospital district?
2. May a public works employee be a city council member?
3. May a public works director, or any other appointed city officer, hold the position of city council member?
Two employees of the Missouri River Medical Center, a hospital district health care facility, have filed for election to that hospital district's board of trustees. Mr. Cheetham questions whether serving in both positions creates a **conflict** of **interest** or is prohibited for any reason. A public works employee for the City of Glendive is also an elected alderman and sits on the Glendive city council. Mr. Burns asks first whether this presents a **conflict** of **interest**, and second, whether the two positions are incompatible.
As noted in Mr. Burns' letter, the question of whether a city employee sitting on the city council presents a **conflict** of **interest** was previously addressed in 41 Op. Att'y Gen. No. 81 (1986). In that opinion, former Attorney General Mike Greely held that there is no inherent **conflict** of **interest** when an employee of the City of Glendive is also an elected member of the city council. That opinion

provides the controlling answer to Mr. Burns' initial question regarding a possible **conflict** of **interest.**

***2** However, adoption of a **conflict**-of-**interest** statute in no way abrogates the common law rule against the holding of incompatible positions. Tarpo v. Bowman Pub. Sch. Dist. No. 1, 232 N.W.2d 67, 71 (N.D. 1975). Because I conclude that the doctrine of incompatible offices prevents a public works employee or director from serving as a city council member, as well as a hospital employee from serving as a trustee of the hospital district, it is not necessary to further analyze the **conflict** of **interest** issue.

The Montana Supreme Court has recognized that two offices are incompatible when one has the power of removal over the other, when one is in any way subordinate to the other, when one has the power of supervision over the other, or when the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both. State ex rel. Klick v. Wittmer, 50 Mont. 22, 144 P. 648 (1914).

The doctrine of incompatible public offices eliminates the public policy concerns inherent in the simultaneous holding of multiple public offices or positions by:

(1) preventing multiple position-holding, so that offices and positions of public trust do not accumulate in a single person; (2) preventing individuals from deriving, directly or indirectly, any pecuniary benefit by virtue of their dual position-holding; (3) avoiding the inherent conflict which occurs when an employee's elected position has revisory power over the employee's superior in another position; and (4) ensuring, generally, that public officeholders and public employees discharge their duties with undivided loyalty.

46 Op. Att'y Gen. No. 26 (1996), citing 43 Op. Att'y Gen. No. 47 at 165 (1989), which cites Acevedo v. City of North Pole, 672 P.2d 130, 134 (Alaska 1983).

In 46 Op. Att'y Gen. No. 26, I also concluded that the common law doctrine of incompatible public offices applies to public employees, as well as to public office holders, and that a county employee appointed by a board of county commissioners and paid by the county cannot serve on the board of commissioners for the same county.

The common-law doctrine of incompatibility extends to positions of public employment as well as public offices. See, e.g., Otradovec v. City of Green Bay, 347 N.W.2d 614 (Wis. Ct. App. 1984). As the Wyoming Supreme Court has stated, it is "inimical to the public interest for one in public employment to be both the employer and the employee or the supervisor and the supervised." Thomas v. Dremmel, 868 P.2d 263, 264 (Wyo. 1994), quoting Haskins v. State ex rel. Harrington, 516 P.2d 1171 (Wyo. 1973).

46 Op. Att'y Gen. No. 26.

Unlike the office of county commissioner, the office of hospital district trustee is not compensated. Mont. Code Ann. § 7-34-2120. Nevertheless, the office of trustee is incompatible with employment by the hospital district. The trustee position has substantial powers over employees of the hospital district. Hospital district trustees employ (and discharge) hospital district employees. The trustees determine, within state guidelines, the salaries and benefits received by hospital district employees. Mont. Code Ann. § 7-34- 2122(1); 37 Op. Att'y Gen. No. 102 (1977). Mr. Cheetham has indicated that the trustees also have direct supervision over the individuals who supervise district employees. Thus, an individual serving in the dual roles of employee and trustee would be in the position of controlling actions and decisions of his or her supervisor which could directly affect his or her job duties and compensation. Likewise, an individual serving as a public works employee and a member of the city council is in the position of controlling the actions and decisions of the employee's supervisor, the public works director.

***3** In each situation, the individual must choose between the clashing duties of two positions, a choice the doctrine of incompatibility of offices was designed to avoid. Township of Belleville v. Fornarotto, 549 A.2d 1267 (N.J. 1988). Such scenarios are clearly "inimical" to the public interest and thus prohibited by the doctrine of incompatible offices.

Mr. Burns' third question concerns whether a public works director, or any other city officer, can be elected to the city council. According to Mr. Burns, the Glendive City Council has supervisory power and the power of removal over the public works director. Thus, the simultaneous holding of the office of city council member and the office of public works director presents a concern similar to that addressed in 46 Op. Att'y Gen. No. 26. There, the positions of county commissioner and county coordinator of disaster and emergency services were found to be incompatible as the county commission has the powers of supervision, revision, and removal over the position of DES coordinator. Similarly, the office of city council member is incompatible with either the office or the

46 Mont. Op. Atty. Gen. No. 26, 1996 WL 751486 (Mont.A.G.)

Office of the Attorney General
State of Montana

*1 Opinion No. 26
December 12, 1996

CONFLICT OF **INTEREST** - Simultaneous holding of office of county commissioner and position of county coordinator of disaster and emergency services;
COUNTY COMMISSIONERS - Simultaneous holding of office of county commissioner and position of county coordinator of disaster and emergency services;
COUNTY OFFICERS AND EMPLOYEES - Simultaneous holding of office of county commissioner and position of county coordinator of disaster and emergency services;
DISASTER AND EMERGENCY SERVICES - Simultaneous holding of office of county commissioner and position of county coordinator of disaster and emergency services;
MONTANA CODE ANNOTATED - Sections 7-5-2101, -2107, 10-3-201, -401 to -406;
OPINIONS OF THE ATTORNEY GENERAL - 43 Op. Att'y Gen. No. 47 (1989), 42 Op. Att'y Gen. No. 94 (1988).

HELD: The office of county commissioner and the position of county coordinator of disaster and emergency services are incompatible, and one individual may not hold both simultaneously.

Mr. Loren Tucker
Madison County Attorney
P.O. Box 36
Virginia City, MT 59755

Dear Mr. Tucker:

You have requested my opinion on the following question:
May an individual simultaneously hold the office of county commissioner and the position of county coordinator of disaster and emergency services?
The Board of County Commissioners of Madison County has appointed one of the county commissioners to the position of county coordinator of disaster and emergency services (DES). Because the Board has supervisory powers over the DES coordinator, you have asked whether one individual should serve both as county commissioner and as DES coordinator.
Your question requires consideration of the doctrine of incompatible public offices. This doctrine arises from the common law and addresses the public policy concerns inherent in the simultaneous holding of multiple public offices or positions. The doctrine was discussed in 43 Op. Att'y Gen. No. 47 (1989), and the analysis set forth in that opinion is useful in the resolution of your inquiry.
The common-law doctrine of incompatible public offices serves the purposes of (1) preventing multiple position-holding, so that offices and positions of public trust do not accumulate in a single person; (2) preventing individuals from deriving, directly or indirectly, any pecuniary benefit by virtue of their dual position-holding; (3) avoiding the inherent conflict which occurs when an employee's elected position has revisory power over the employee's superior in another position; and (4) ensuring, generally, that public officeholders and public employees discharge their duties with undivided loyalty. 43 Op. Att'y Gen. No. 47 at 165, citing Acevedo v. City of North Pole, 672 P.2d 130, 134 (Alaska 1983).
More than 80 years ago the Montana Supreme Court observed that offices are incompatible when one has power of removal over the other, when one is in any way subordinate to the other, when one has the power of supervision over the other, or when the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both. State ex rel. Klick v. Wittmer, 50 Mont. 22, 144 P. 648 (1914). See also 63A Am. Jur. 2d Public Officers and Employees, §§ 65, 78 (1984); 67 C.J.S. Officers and Public Employees § 27(a) (1978).
*2 The common-law doctrine of incompatibility extends to positions of public employment as well as

public offices. See, e.g., Otradovec v. City of Green Bay, 347 N.W.2d 614 (Wis. Ct. App. 1984). As the Wyoming Supreme Court has stated, it is "inimical to the public interest for one in public employment to be both the employer and the employee or the supervisor and the supervised." Thomas v. Dremmel, 868 P.2d 263, 264 (Wyo. 1994), quoting Haskins v. State ex rel. Harrington, 516 P.2d 1171 (Wyo. 1973).

In 42 Op. Att'y Gen. No. 94 (1988), it was held that the offices of county commissioner and county high school trustee are incompatible and that one individual may not hold both offices simultaneously. That opinion, which also applied the doctrine of incompatible offices set forth in Klick, noted that crucial to its conclusion was the fact that under state law a county commissioner has certain supervisory powers over a school trustee.

The simultaneous holding of the office of county commissioner and the position of county DES coordinator presents a similar concern. The board of county commissioners has the general power to manage the business and concerns of the county and to employ such persons as it deems necessary to assist in the performance of its duties. Mont. Code Ann. §§ 7-5-2101, -2107. As required by Mont. Code Ann. § 10-3-201, the county commissioners must designate an agency responsible for emergency and disaster prevention and preparedness and coordination of response and recovery. The board, through its chairman, must notify the division of disaster and emergency services of the state department of military affairs concerning the manner by which the county is providing or securing emergency and disaster planning and services, and it must identify the person responsible for obtaining the planning and services.

To meet its statutory obligation to provide for such planning and services, the Board of County Commissioners in Madison County employs a county DES coordinator, who assists the board in the preparation of a county-wide or interjurisdictional disaster and emergency plan and program and in the fulfillment of its other duties under Mont. Code Ann. § 10-3-401. The DES coordinator would also assist the board and its chairman with their duties in the event of a local emergency proclamation or disaster declaration under Mont. Code Ann. §§ 10-3-402 to -406.

The county DES coordinator in Madison County is a county employee appointed by the Board of County Commissioners and paid by the county. While the county may be reimbursed, in whole or in part, from state and federal sources for the expenses associated with the DES coordinator's position, the fact remains that the county commissioners have the power of supervision, revision, and removal over the position of DES coordinator. A county commissioner who is also employed as a county DES coordinator would be laboring under a conflict of duties between the office and the position. Based upon the rationale in Klick and the authorities discussed above, I conclude that the office of county commissioner and the position of county DES coordinator are incompatible and that one individual may not hold both simultaneously.

*3 Because of this conclusion, I have not addressed the other concerns raised in your letter of inquiry. In addition, this opinion does not address the simultaneous holding of the position of DES coordinator and any office or position other than that of county commissioner; to determine whether other offices and positions may be incompatible, the appropriate analysis would have to be applied on a case-by-case basis.

THEREFORE, IT IS MY OPINION:

The office of county commissioner and the position of county coordinator of disaster and emergency services are incompatible, and one individual may not hold both simultaneously.

Sincerely,

Joseph P. Mazurek
Attorney General
46 Mont. Op. Atty. Gen. No. 26, 1996 WL 751486 (Mont.A.G.)
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42 Mont. Op. Atty. Gen. 366, 42 Mont. Op. Atty. Gen. No. 94, 1988 WL 429915 (Mont.A.G.)

Office of the Attorney General
State of Montana

*1 Opinion No. 94
July 8, 1988

COUNTY COMMISSIONERS--Serving as county commissioner and county high school trustee simultaneously;
PUBLIC OFFICE--Serving as county commissioner and county high school trustee simultaneously;
SCHOOL BOARDS--Serving as county commissioner and county high school trustee simultaneously;
MONTANA CODE ANNOTATED--Sections 7-4-2110, 7-5-2103, 7-8-2216, 20-3-310, 20- 6-213, 20-6-217, 20-6-309;
MONTANA CONSTITUTION--Article VII, section 10;
OPINIONS OF THE ATTORNEY GENERAL--8 Op.Att'y Gen. at 402 (1920).

HELD: 1. The offices of county commissioner and county high school trustee are incompatible, and one individual may not hold both offices simultaneously.

2. Although an individual may not simultaneously hold the offices of county commissioner and county high school trustee, state law does not prevent an individual from holding one of these offices while seeking the other.

John T. Flynn
Broadwater County Attorney
Broadwater County Courthouse
Townsend MT 59644

Dear Mr. Flynn:

You have asked my opinion on the following questions:
1. May an individual simultaneously hold the offices of county commissioner and county high school trustee?
2. What is the procedure to be followed when a person holding one position files and runs for an incompatible office?
The general rule is that public offices may not be held concurrently by the same person if those offices are incompatible in nature. State ex rel. Klick v. Wittmer, 50 Mont. 22, 144 P. 648 (1914). The Klick opinion sets forth a number of factors that should be considered in determining whether offices are incompatible.
As you note in your opinion request, in 8 Op.Att'y Gen. at 402 (1920) it was held that the office of county commissioner was incompatible with the office of school trustee. Citing the Klick opinion, the 1920 Attorney General's Opinion concluded that the nature and duties of the two offices were such that it would be improper for one person to retain both offices. Crucial to the opinion's conclusion was the fact that under state law a county commissioner had certain supervisory powers over a school trustee.
The reasoning followed in 8 Op.Att'y Gen. at 402 (1920) is still persuasive. Existing state statutes continue to give county commissioners some supervision over school trustees. County commissioners also have other responsibilities with respect to school districts. See, e.g., §§ 7-4-2110, MCA (county commissioners supervise the official conduct of all county officers and officers of districts and other subdivisions of the county charged with assessing, collecting, safekeeping, managing, or disbursing the public revenues); 7-5-2103, MCA (county commissioners divide counties into school districts); 7-8-2216 (county commissioners may sell county property to school district); 20-3-310, MCA (county commissioners may suspend a school trustee when charges are preferred against that trustee); 20-6-213, 20-6-217, 20-6-309, MCA (county commissioners hear appeals on decisions by school superintendents on transfers of territory from one elementary district to another, creation of new

elementary districts, and organization of a joint high school district). There are also several statutes concerning the duties of a board of county commissioners to levy taxes to finance local education.
*2 For the above-stated reasons, I believe that the conclusion reached in 8 Op.Att'y Gen. at 402 (1920) remains valid, in spite of the fact that many of the duties of the two offices in 1920 have since been amended or repealed. The current nature and duties of the offices of county commissioner and county high school trustee could give rise to possible **conflicts** of governmental **interest** if one person were to retain both offices simultaneously.
Your second question concerns the effect of the filing by an officeholder for a second office that is incompatible. As a rule, Montana law does not prevent an officeholder from seeking an incompatible office, but rather from holding incompatible offices. See Committee for an Effective Judiciary v. State of Montana, 41 St.Rptr. 581, 679 P.2d 1223 (1984), in which the Court recognized the existence of a general constitutional scheme declaring indirectly the rights of all officeholders in all branches of government to seek other office while still holding office. 41 St.Rptr. at 587, 679 P.2d at 1228.
An exception to this general scheme is found in Article VII, section 10 of the Montana Constitution, which requires that one who holds a judicial position must forfeit the office by filing for an elective public office other than a judicial position. By contrast, there is no comparable prohibition for the offices of county commissioner or county high school trustee.

THEREFORE, IT IS MY OPINION:

1. The offices of county commissioner and county high school trustee are incompatible, and one individual may not hold both offices simultaneously.
2. Although an individual may not simultaneously hold the offices of county commissioner and county high school trustee, state law does not prevent an individual from holding one of these offices while seeking the other.

Very truly yours,

Mike Greely
Attorney General
42 Mont. Op. Atty. Gen. 366, 42 Mont. Op. Atty. Gen. No. 94, 1988 WL 429915 (Mont.A.G.)
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